United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-7021

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

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No. 76-7021

FREDERIC P. WIEDERSUM ASSOCIATES,
Plaintiff-Appellee,

—against—

NATIONAL HOMES CONSTRUCTION CORPORATION,
Defendant-Appellant.

On Appeal From the United States District Court for the Eastern District of New York

BRIEF FOR DEFENDANT-APPELLANT

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ISSUES PRESENTED FOR REVIEW

1. Where the evidence of the plaintiff architect established that (a) final plans were required to be in the defendant general contractor's hands no later than March 30, and (b) final plans were not sent to defendant until April 5, and where plaintiff sought to show that it had satisfied the requirement of timeliness by sending preliminary plans on March 30 which it argued were substantially identical to the April 5 final plans, was it error to exclude defendant's evidence that the March 30 preliminary plans were materially different from the April 5 final plans on the ground that the adequacy of the plans was not an issue because not pleaded as an affirmative defense?

2. Where it was conceded that the timeliness of plaintiff's submission of final plans was an issue, was it error to exclude defendant's evidence that the March 30 preliminary plans, which plaintiff argued contained all nec-

essary information, lacked the information required for defendant to put together a bid by the bidding deadline of April 6?

3. Where defendant sought to introduce evidence as to the good faith steps that it had taken to prepare and submit a bid, was it error for the Court to exclude such evidence on the ground that the adequacy of the plans was an unpleaded affirmative defense?

4. Where the complaint alleged that defendant was obligated to submit for competitive bidding a bid based on plans drafted by plaintiff and further alleged that such obligation derived from the agreement of the parties to be governed by a previous written contract, which contract by its terms required that plans drafted by plaintiff be in accordance with the specifications published by the authority soliciting the bids, was it part of plaintiff's affirmative case to establish that its plans met the specifications or was it an affirmative defense to be pleaded by defendant?

5. Was it error for the Court to refuse defendant's request to admit the pleadings into evidence and to preclude the pleadings from otherwise being before the jury?

6. Where both sides had submitted conflicting written requests to charge and the course of the trial had indicated that the Court's charge on a number of other issues would be crucial, was it error for the Court to refuse to advise counsel of the charge prior to summation despite defendant's request for such advice and defendant's referral of the Court to Rule 51 so requiring?

7. In an architect's contract action for its fee, was it error, over defendant's objection, to charge the jury on promissory estoppel or to instruct the jury that they might find in plaintiff's favor if they found that plaintiff was led to believe by defendant's actions that a bid would be submitted?

8. Was it error for the Court to submit the case to the jury with a charge that was conflicting and irreconcilable on several elements of the case?

9. Where the only evidence as to plaintiff's costs was $6,556.02, was there sufficient evidentiary basis for the jury's verdict of $150,000 in plaintiff's favor so as to justify the Court's denial of defendant's motion to reduce the amount of the verdict?

STATEMENT OF THE CASE

This is an appeal from a judgment of the United States District Court for the Eastern District of New York, Hon. Walter Bruchhausen, entered on December 12, 1975, on a jury verdict of $150,000 in plaintiff's favor.

The action was brought by plaintiff Frederic P. Wiedersum Associates ("Wiedersum"), an architectural firm, against defendant National Homes Construction Corporation ("National"), a general contracting firm, to recover alleged damages for the failure of National to submit in competitive bidding a bid to construct 200 family housing units for the Navy at the Naval Weapons Station, Charleston, South Carolina (the "South Carolina Project"), based on plans that had been drafted by Wiedersum and provided to National as part of a joint venture for the purpose of submitting a bid.

The complaint alleged that in 1971 Wiedersum and National entered into a written agreement whereby Wiedersum agreed to design a facility acceptable to the New Jersey Educational Facilities Authority; that in January 1973 the parties agreed that the terms and procedures of their previous contract would be followed in connection with the South Carolina Project; that numerous meetings were held to provide National with all of the information that it needed in order to prepare a successful bid; that Wiedersum expended time, labor and expense in connection with the South Carolina Project; that on or about April 4, 1973 Wiedersum sent to National the final plans but National did not submit a bid, thus depriving Wiedersum of a chance to become entitled to the $250,000 fee to which it would

have been entitled if, and only if, National's bid had been the winning bid. (8-10*)

A second cause of action added the allegation that Wiedersum relied on National's representation that it would submit a bid, expended time, labor and expense, and was entitled to recover such amounts from National. (10-11) Plaintiff has since characterized the second cause of action as one based on the theory of promissory estoppel. The third and fourth causes of action alleged misrepresentation and negligence, respectively. (11) The fifth cause of action alleged that had a bid been submitted on the plans drafted by Wiedersum, it would have been successful. (12) On the eve of trial, plaintiff represented by letter that it would proceed only on its first two causes of action.

Trial began on December 8, 1975, and was completed on December 12, 1975. Plaintiff called as witnesses Fred G. Wiedersum and Norman Wiedersum (the principals of Wiedersum), William Laverty (Wiedersum's business developer), and Albert Voorneveld (Wiedersum's architect administrator). Defendant called as witnesses John Gleason (a former officer of National who had been in charge of the South Carolina Project), Michael Bolka (National's estimator on the South Carolina Project), and Arvil Duley (general manager of National who reported to Gleason). Plaintiff marked 35 documentary exhibits and defendant marked 13 documentary exhibits.

Defendant's motion for a directed verdict at the close of plaintiff's case pursuant to Rule 50(a), Federal Rules of Civil Procedure, was denied (381-382), as was defendant's motion for a directed verdict at the close of the evidence. (688)

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* Parenthetical references, unless otherwise indicated, refer to pages of the Joint Appendix. Each page of the Joint Appendix is paginated by a number followed by the letter "a" which letter reference is not repeated herein. Parenthetical references herein preceded by the letter "R" are to certain pages of the trial transcript which are part of the record on appeal but which have not been reproduced in the Joint Appendix.

The jury returned a verdict of $150,000 in plaintiff's favor. (761) Defendant's motion for judgment notwithstanding the verdict was denied (761), as was defendant's motion to reduce the amount of the verdict. (761)

STATEMENT OF FACTS

Factual Background

This action involves the question of whether National bound itself to submit a bid to the Navy as part of competitive bidding for the South Carolina Project; and if so, whether the fact that a bid was not submitted constituted a breach of obligation owed by National to Wiedersum. Although the action involves only the submission of a bid for the South Carolina Project, the parties had previously collaborated with respect to other projects and both sides argued the past relationship as evidence in support of their respective positions.

National and Wiedersum first collaborated in 1971 when Wiedersum drafted plans for, and National submitted a bid to the New Jersey Educational Facilities Authority for the construction of student housing. (the "New Jersey Project") Both the New Jersey Project and the South Carolina Project involved the "turnkey" concept. Under that concept, the governmental entity seeking competitive bids sets out detailed specifications and the prospective bidders submit plans in conformance to the specifications for the construction of the project along with a bid indicating the cost at which they commit themselves to do the construction if a contract is awarded. At completion of such a facility, it is turned over ("turnkey") to the governmental authority in finished form ready for use.

In 1971, National was a general contracting firm with considerable experience in the area of turnkey projects for the military. (R 67) Wiedersum desired to associate itself with a firm of the reputation of National in order to compete for construction contracts being awarded by the New Jersey Educational Facilities Authority. (R 44-46) The parties met and entered into a written contract dated March 29, 1971. (R 47) The contract provided that Wieder-

sum would design plans in accordance with the specifications of the New Jersey Educational Facilities Authority. (77-78) The contract further provided that the parties would then agree whether or not a bid would be submitted. (79) In the event that a bid was to be submitted, National would, on the basis of the plans drafted by Wiedersum, estimate the direct costs and overhead and add an increment that would include the fee of Wiedersum and a profit factor for National. (79) It was only in the event that a successful bid was submitted and a construction contract awarded that Wiedersum would receive its fee or National would have the chance to earn a profit. (78-79) Otherwise, the parties were to bear their own costs and expenses in connection with any work done on a bid that turned out to be unsuccessful. (78-80)

The New Jersey Project involved several jobs for which construction contracts were being awarded. (R 47-48) National and Wiedersum submitted bids for two of those construction contracts and were unsuccessful in both cases. (R 48)

Thereafter, the parties collaborated in preparing and submitting a bid in 1972 to the Navy for the construction of housing units at the naval complex Warminster, Willow Grove, Pennsylvania, and were again unsuccessful. (R 52-54) They briefly considered collaborating and submitting a bid and proposal on another project for the Navy at New London, Connecticut, but the effort was dropped several days after it was first discussed. (R 67-68)

The South Carolina Project first came to Wiedersum's attention when Wiedersum received from the Navy a one page notice in January, 1973, that proposals for the South Carolina Project were being sought. (Ex.* 3, 765; 176) Laverty of Wiedersum's office sent a copy of the notice to Gleason of National, together with a letter inquiring as to whether National had any interest in the project. (Ex. 4, 766; 178; 180) Gleason responded by saying that National was interested and offering to meet to discuss the matter

* "Ex." refers to the designated trial exhibit, which can be found at the next designated citation.

in more detail after receiving the specifications from the Navy. (Ex. 5, 767; 181; 182)

There was no written contract between National and Wiedersum covering the South Carolina Project. However, the procedure followed for the South Carolina Project was not dissimilar to that followed for other projects on which the parties had worked together. After the detailed specifications were sent out to the prospective bidders by the Navy, indicating the specifics as to the work required, a pre-proposal conference was held by the Navy on February 20, 1973, at the site of the proposed construction in South Carolina. (185-186) The purpose of the pre-proposal conference was to afford the prospective bidders an opportunity to view the area and discuss the project further with Navy personnel to obtain a better understanding of what was expected. (186)

The deadline for submission of bids was April 6, 1973. (192-193) Between the time of the pre-proposal conference and April 6, the usual practice was for Wiedersum to draft preliminary plans containing its designs for the landscaping and site work required by the Navy, as well as its design for the buildings to be constructed. The buildings were to be designed to meet certain standards supplied by National so that the buildings could be constructed using prefabricated units supplied by National's affiliated corporation which in effect acted as another subcontractor. After the preliminary plans were reviewed and discussed by the parties, necessary changes were to be incorporated into more detailed final plans which had to satisfy the Navy's specifications. Timely receipt of the detailed final plans was crucial to National's ability to formulate a bid because it subcontracted out the majority of the work (508), and no subcontractor would submit a bid to National without having reviewed the final plans. (535)

National's practice was that after receiving the final plans, it would circulate them to subcontractors in the construction area to obtain final binding bids from three subcontractors for each type of labor and material required. (439; 535; 565) National would also use the final plans to

obtain cost figures from its affiliated corporation for the prefabricated components of the buildings. It was of utmost importance to National to be able to calculate its bid with precision, because if National were awarded the contract, it was bound to build the project for the amount of the bid, and performance at that figure had to be guaranteed by a cost bond which National was required to post at the time of submission of the bid. (484)

To be able to calculate its bid with precision, it was crucial for National to have final plans in its hands sufficiently ahead of time to enable it to perform all of the complicated tasks necessary for the final pricing of the bid. Wiedersum first had been told that the final plans for the South Carolina Project were needed two weeks prior to the submission date of April 6. Since the time span between the pre-proposal conference and the submission date was short to begin with, National compromised and later informed Wiedersum that it would attempt to do the job if final plans were submitted to it six to eight days prior to the submission date. Wiedersum's own witnesses conceded that they understood that National needed the final plans at least six days before April 6. (255)

Plaintiff's Case

The complaint itself alleges that final plans were sent to National on April 4, only two days prior to the submission date. (complaint ¶ 7; 10) Indeed, Laverty's testimony was that the final plans were not sent out by air express until the afternoon of April 5, the day before the submission date, under a covering letter dated April 4. (231-233; 100-101) Obviously, the final plans received on April 5 (the "April 5 plans") were far too late to be the basis of any bid to be submitted on April 6.

Laverty sought to show that timely plans were sent to National when he testified that plans dated March 30 (the "March 30 plans") were sent to National on that date.*

* John Gleason, who for unrelated reasons was fired by National in August 1973 (554-555), testified that the March 30 plans reached his office on April 2. (542-543; 428-429) Gleason further testified that he left National Homes with hard feeling and only agreed to

(footnote continued on next page)

(211; 214-215; 222-223) Laverty testified that the March 30 plans were almost identical to the April 5 plans, varying only slightly in the title or a word or two. (226) Voorneveld, Laverty's superior, testified that any changes between the March 30 plans and the April 5 plans were extremely minor (311) and would in no way affect National's ability to obtain bids from subcontractors or to complete final pricing for the bid. (311-312) National's attempt to introduce testimony to refute plaintiff's testimony that there was no substantial difference between the March 30 plans and the April 5 plans by showing massive changes between the March 30 plans and the April 5 plans was precluded by the Court, supposedly on the basis of its ruling that the adequacy of the plans was not an issue in the case because it had not been pleaded as an affirmative defense. (473-481)

Wiedersum presented testimony that its usual fee for a job the size of the South Carolina Project would be 6% of the cost of construction and would have amounted to $208,000, after discounting 1% because Wiedersum would not be performing any of the work that would have been required of it after the bid had been awarded to National (if it ever were). (342-345) The only evidence as to the amount of Wiedersum's costs and expenses incurred for the South Carolina Project showed costs of $6,556.02. (378-379)

Plaintiff's Motion to Preclude Evidence on Adequacy of the Plans

At the close of plaintiff's case and denial of defendant's motion for a directed verdict, plaintiff moved to preclude

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cooperate and testify shortly before the trial, meeting with counsel for National for the first time the Sunday night before the trial commenced. (554-557)

Laverty testified that the March 30 plans were sent to Arvil Duley in a package containing forms from the Navy and a covering letter referring to the enclosures only as "Bid Documents". (215) Duley testified that he had asked plaintiff for forms from the Navy needed to fill out the proposal, which forms he referred to as "bid documents", and that he never asked for, heard about, or saw any plans from plaintiff. (649-651)

Prior to Gleason's coming to New York to testify, defendant was not aware that the March 30 plans had been received by it, and had made a motion for summary judgment based on that fact.

National from introducing any evidence as to the adequacy of the plans submitted to National by plaintiff on the ground that such evidence constituted an affirmative defense of failure of consideration under Rule 8, Federal Rules of Civil Procedure, which had not been pleaded. (382-385) Plaintiff claimed that it was first made aware of the claimed inadequacy of its plans by National's trial memorandum. (382) Plaintiff then referred to an interrogatory that had been addressed to National over one year after the commencement of the action which inquired as to the reasons for National's decision not to submit a proposal. (383) How the answer to an interrogatory related to whether or not the insufficiency and inadequacy of Wiedersum's plans was an affirmative defense was not stated. The Court, however, granted the motion and thereafter on the basis of that decision precluded defendant from adducing any evidence on the inadequacy of not only the April 5 and March 30 plans, but also a prior set of preliminary plans dated March 6, the nature of the differences between the March 30 and April 5 plans, and other matters clearly not pertaining to the adequacy of any plans.

The reference in National Homes' trial memorandum to the inadequacy of Wiedersum's plans read as follows:

> "Eight sets of final plans did arrive on April 5, 1973 with a letter from plaintiff dated April 4. This was much too late to gather the necessary cost data. Subsequent review of these plans by defendant revealed that even had they been received eight or ten days prior to April 6, they contained so many deficiencies that no responsible bid could have been submitted without substantial revision of the plans. For instance, net area shown on the plans exceeded the net area prescribed in the Navy's criteria by approximately 15%. The floor plans for the units were not complete. Some side elevation plans did not match floor plans. No foundation sections were shown for each type of building. No street sizes or other details were given." (120-121)

The interrogatories and defendant's answers thereto which were referred to by plaintiff read as follows: (21-22; 23-27)

> "*Interrogatory No. 3.* State whether a deliberate decision was made by defendant, its officers or its employees not to submit a bid on the Charleston project which is the subject of this litigation.
>
> "*Answer.* Yes.
>
> "*Interrogatory No. 4.* If the answer to Interrogatory 3 is in the affirmative:
>
> (a) State the date on which such a decision was made;
>
> (b) Identify all persons who were involved in such a decision; and
>
> (c) State the reasons for defendant's decision not to submit a bid on the Charleston project.
>
> "*Answer.* (a) On or about April 2, 1973. (b) The decision was made by John Gleason. (c) The reasons for the decision not to submit a bid for the Charleston project were the failure of plaintiff to submit plans on time, problems with the soil conditions at the project location and the inability to get bids from subcontractors for necessary land improvement work."

It should be noted that the interrogatories refer only to defendant's reasons for deciding not to submit a bid. No interrogatory was addressed to defendant asking whether the final plans were adequate, although such an interrogatory could have been drafted and would have been most relevant on the issue of whether plaintiff had met its obligations under the so-called contract pleaded in the complaint. Similarly, although the deposition of three present employees of National (not including Gleason) was taken over a two-day period, at no time was a question asked concerning the adequacy of the plans.

In fact, Wiedersum had put the adequacy of the plans in issue by its pleading and proof. The complaint alleged (¶ 5, at 9) that the agreement between Wiedersum and National on the South Carolina Project was to be based on the written contract which they had signed two years before in respect to turnkey projects for the New Jersey Educational Facilities Authority (9), which contract called for Wiedersum's plans to be in accordance with the specifications of the authority soliciting the bids. (77) The complaint also alleged (¶ 6) that there were a number of meetings and conversations between Wiedersum and National in the course of preparation of the South Carolina plans so that National would have all necessary information to calculate a successful bid. (10) It was then alleged that "[o]n or about April 4, 1973, Wiedersum sent to National the *final* plans and specifications for the South Carolina Project . . ." (emphasis added). (10) National's answer (¶ 6) denied the allegations of paragraph 7 of the complaint, except admitted "that on or about April 4, 1973 plaintiff sent to defendant plans and specifications for the South Carolina Project." (15) The sequence of pleading indicates, and logic directs, that the plans Wiedersum was to prepare and submit to National so that National could submit a responsible bid for the South Carolina Project must have been plans that conformed to the specifications prescribed by the Navy for the South Carolina Project, and must have had that "necessary information" that the complaint alleged (10) National needed to calculate the bid. National's denial of having received "final" plans for the South Carolina Project puts in issue the adequacy of the April 5 and all prior plans.

Furthermore, Wiedersum's introduction into evidence at the trial of the April 5 plans, which its witnesses and complaint identified as the final plans, had to put in issue the adequacy of all prior plans submitted to National, otherwise there could be no explanation for Wiedersum's submission of the April 5 plans. Certainly, Wiedersum's introduction into evidence of the March 30 plans to prove

that it met its obligation as to timeliness and then Wiedersum's introduction into evidence of the April 5 plans as the "final plans" had to put in issue the differences between the two sets of plans and the adequacy of the March 30 plans.

In continuing its preclusion objections, however, plaintiff sought to have its cake and eat it too. Despite the unanimous testimony of Voorneveld and Laverty that the final plans were the April 5 plans (226-231; 309-311; 678), plaintiff's counsel continually argued to the Court that no evidence that would reflect at all on the adequacy of any plans could be admitted. To obtain that end, plaintiff's counsel represented to the Court, contrary to the complaint (¶ 7, at 10) and the testimony of plaintiff's witnesses, that "[w]e say that the final plans were submitted on the 30th." (479) When defendant's counsel argued that the then current offer was simply to show that the changes between the March 30 plans and the April 5 final plans were not minor, as Laverty and Voorneveld had testified, plaintiff's counsel again argued "[y]our purpose is to show that what was submitted on the 30th was not sufficient as final plans, and that is not an issue." (479) Unfortunately, the Court bought plaintiff's argument.

Defendant's Case

In the latitude remaining after plaintiff's motion to preclude nad been granted, defendant sought to show that there was no agreement committing defendant to submit a bid simply because plaintiff had submitted plans (398-399; 414-416; 482-484); that the April 5 plans were submitted too late for the April 6 deadline (483-484; 539; 560); and that the March 30 plans and an early draft of preliminary plans that had been submitted to National by Wiedersum on March 6 (416; 444-445; 583-584) were woefully lacking in detail for National, despite diligent and good faith efforts, to prepare a bid in time to meet the April 6 deadline. (443-448; 581-606)

Although National contended and continues to contend that the plaintiff's motion to preclude evidence showing

the inadequacy of the plans was granted in error, it should be clear that the motion could only relate to the sufficiency of the April 5 plans, since those were the only plans referred to in the complaint and were the only plans as to which defendant had an obligation to address its pleading. However, before the trial was over, matters degenerated to the stage where National was not only precluded from putting in evidence that any plans were inadequate (without regard to whether the plans at issue were the April 5 plans, the March 30 plans or the March 6 plans), but National was also precluded from putting in evidence as to the differences between the March 30 plans and the April 5 plans and as to what steps National was taking to develop a bid. The latter evidence was excluded on plaintiff's argument that it might reflect on the adequacy of plans (again, without regard to whether the plans were the April 5 plans, the March 30 plans, or the March 6 plans).

National's chief witness was Gleason. His testimony was severely restricted, even when he sought to testify on facts put in evidence by Wiedersum. Voorneveld had testified that the March 30 plans were sufficient to enable National to do the necessary pricing work. (312) When Gleason was questioned as to any problems that he had in completing the necessary pricing with the March 30 plans, an objection was made and sustained on the grounds that the testimony was precluded by the Court's prior ruling on the plaintiff's motion to preclude. (431-433)

Similarly, Gleason's testimony concerning whether National was able to obtain bids from subcontractors was excluded. (434, 440) Voorneveld had testified that the April 5 plans differed only in minor respects from the March 30 plans. Since it had been conceded that National needed the final plans a minimum of six days prior to the submission date of April 6 (208; 255), the extent of the differences between the two sets of plans was crucial on the issue of timely submission of final plans. On cross examination, Voorneveld was taken through the individual

pages of the two sets of plans and asked to indicate any differences between them. (333-337) Both he and Laverty testified that any changes from the March 30 plans would be indicated by a notation on each page of the April 5 plans on which changes had been made, and that the few changes made were very minor. (227; 333-334)

When Gleason sought to testify that the differences identified by Voorneveld were major and that there were many additional major differences not identified by Voorneveld or designated as changes on the April 5 plans, Gleason was curtailed by the Court on the ground that the adequacy of the plans was not an issue. (473-482)

Gleason testified that if plans did not have the information needed to obtain bids from subcontractors, his practice would be to notify the architect, whose responsibility it was to make changes to the plans. (441) When Gleason then sought to testify that early in the week of April 2, after reviewing the March 30 plans, Gleason telephoned Laverty to advise Laverty of the deficiencies in the March 30 plans and the changes that would have to be made, plaintiff's objection and motion to strike was granted on the same grounds. (443-444) Yet, such evidence was crucial in providing an explanation for the existence of the April 5 plans and National's inability to get bids from subcontractors.

Mike Bolka testified that his function with respect to the South Carolina project was to visit the Charleston area and obtain commitments from subcontractors for site development work. (577-578) He testified that, although he delayed the trip as long as possible awaiting the final plans, he finally had to go into the Charleston area on Sunday, April 1, with the March 6 preliminary plans that had been drafted by Wiedersum over a month prior, and that he did not have the March 30 plans with him. (579-584)

Mr. Bolka's testimony showed that National, under the most adverse conditions, was attempting to do as much of the pricing work as could be done with the limited amount

of information available. Bolka's notes (Ex. K, 785; 786) showed the various problems that he encountered in obtaining bids from subcontractors for the necessary work. (786) His memo covered eight separate areas: (1) excavation, (2) streets, (3) sidewalks, (4) storm drainage, (5) sanitary sewer, (6) water system, (7) gas distribution system and (8) landscaping. (586-593)

The Court sustained plaintiff's objection to introduction of evidence on all items except excavation work on the ground that only that item related to the problem with soil conditions referred to in National's answer to interrogatory 4 (586-587), and that the remaining points of the memo were excludable because they were not within the scope of the answers to interrogatories. Even if the scope of the interrogatory answers could limit the trial evidence, the Court ignored the fact that the excluded items bore directly on the inability of National to obtain bids from subcontractors for site improvement work, a matter specifically referred to in the answer to Interrogatory No. 4. (25) Although Bolka testified that he did not have the March 30 plans or April 5 plans with him, the Court refused to admit Bolka's memorandum into evidence except as to its point one. (589; 592-593) Bolka was even prevented from testifying that he could not obtain bids from various subcontractors. (600-603)

The complaint alleged that the final plans were submitted on April 4, 1973. In view of plaintiff's own concession that a minimum of six days was needed prior to the submission date of April 6, it was critically important that the April 4 date in the complaint be shown to the jury as an admission. Yet, the Court rejected defendant's request that the pleadings be marked as an exhibit on the ground that the "pleadings are always before the Court." (667) The Court then refused to allow the pleadings to go to the jury in any form. (707-708)

Plaintiff's Request to Charge had asked that the jury be given an instruction on the issue of promissory estoppel.

(item 3) (145) National's trial memorandum had set forth the reasons why such a charge was inappropriate as a matter of law in a case in which the basis of the claim was breach of an architect's contract for its fee. (134) Nevertheless, National had submitted an alternative charge in the event that the Court decided to give an instruction on promissory estoppel. (164) For this reason, and because defendant was extremely uncertain how the Court was going to charge on adequacy and the differences in the plans, it was vitally important for defense counsel to know how the Court would instruct the jury in order to argue a meaningful summation to the jury. Although the Court was requested prior to summation by defendant pursuant to Rule 51 to inform counsel how it intended to charge the jury, that request was refused. (608) The Court said: "I've never done that. It works out very well, wait till the end." (688) Unfortunately, it did not work out so well for defendant.

ARGUMENT

I

The Court Misapplied its Initial Ruling Excluding Evidence on Adequacy.

Although National argues (Point II, *infra*) that the Court's initial ruling on adequacy was in error, the most egregious and persistent error committed was the Court's misapplication of that ruling, even assuming its propriety, to exclude various other items of crucial and relevant evidence which had nothing whatsoever to do with the adequacy of Wiedersum's final plans, such as the adequacy of the preliminary plans for the purpose of National's formulating a bid and the differences between the March 30 and April 5 plans. The Court expanded on its ruling that the adequacy of the final plans was an affirmative defense with later rulings that evidence would be excluded unless it related to reasons given by National in its answer to Interrogatory No. 4 as to why it decided not to put in a bid. The effect was not only to exclude evidence

that went to the timeliness of the submission of Wiedersum's final plans, but also to exclude evidence of the actions taken by National to perform under the contract alleged and to exclude National from putting in evidence on matters that Wiedersum had raised as part of its affirmative case.

A. The Interrogatories

Plaintiff, in support of its argument that the sufficiency of the plans was an affirmative defense, quoted from National's answers to interrogatories. Interrogatory No. 4, and the answer thereto, which was argued to limit the proof that National could put forward, read as follows: (25)

> "*Interrogatory No. 4.* If the answer to Interrogatory 3 is in the affirmative:
>
> (a) State the date on which such a decision was made;
>
> (b) Identify all persons who were involved in such a decision; and
>
> (c) State the reasons for defendant's decision not to submit a bid on the Charleston project.
>
> *Answer.*
>
> "(a) On or about April 2, 1973.
>
> (b) The decision was made by John Gleason.
>
> (c) The reasons for the decision not to submit a bid for the Charleston project were the failure of plaintiff to submit plans on time, problems with the soil conditions at the project location and the inability to get bids from subcontractors for necessary land improvement work."

It should first be pointed out that the answer to the interrogatory had nothing whatsoever to do with whether or not there was a failure of consideration required by Rule 8(c) to be pleaded as an affirmative defense. The interrogatory asked National's reasons for its decision not to submit a bid. Assuming for the sake of argument that there had been a failure of consideration, the fact is that

National might have based its decision not to submit a bid on other grounds. However, even if the interrogratory at issue had specifically addressed the questions of (1) whether there was a failure of consideration or (2) whether the plans submitted by Wiedersum were insufficient, it would still have been error to preclude National from introducing evidence that varied from the interrogatory answer. *Victory Carriers, Inc.* v. *Stockton Stevedoring Co.,* 388 F.2d 955, 959 (9th Cir. 1968); *Ray* v. *J. C. Penney Co.,* 274 F.2nd 519, 521 (10th Cir. 1959); *Pressley* v. *Boehlke,* 33 F.R.D. 316, 317 (W.D. N.C. 1963). Answers to interrogatories are merely admissions and the variance between other evidence and the answers is merely an inconsistency to be resolved by the trier of fact. (*id.*)

To limit National's trial evidence to the scope of its interrogatory answer, even if the evidence offered had been inconsistent—which it was not—was error and prejudicial in the present case. The record shows that National's decision whether to submit a bid was made by Gleason. (538-539) The testimony of Gleason indicated that he had left National as a result of a disagreement with the Chairman of the Company with harsh feelings shortly after the period here relevant (554-555) and only agreed to come to New York to aid the defense a few days prior to the trial. He further testified that he arrived in New York to confer with National's attorneys the day before the trial commenced. (557) Any information that he had was not available prior to that time. (*id.*)

B. Timeliness

Even if it were not error to preclude National from presenting evidence that varied from its answer to interrogatories or which established the inadequacy of the final plans, the answer to Interrogatory No. 4 (25) clearly raised the failure of Wiedersum to submit those plans in a timely manner. That failure was separate and apart from any question of the adequacy of the final plans. Yet, time and time again, National's attempts to introduce evidence on the timeliness of the final plans was prevented by the Court.

The complaint alleges, at the only point where any reference is made to the date on which plans were submitted, that final plans were submitted on April 4. (10) The testimony of Laverty, who sent the plans, clearly established that the plans did not go out until April 5 (231-232; Ex. 17), the day prior to the date on which bids were required to be submitted. It would be ridiculous to argue that plans submitted the day prior to the bid deadline were timely. The testimony was that two weeks were needed. (435) Laverty conceded that six days was the minimum period. (255) Obviously, if the April 5 plans were the final plans, the uncontradicted testimony establishes that they were untimely in the extreme.

Wiedersum sought to establish as part of plaintiff's case that plans were submitted in a timely manner by introducing the March 30 plans and contending that they were virtually identical to the April 5 plans. That being the case, any differences between the two became immediately relevant.

Plaintiff's counsel, in his opening statement, referred to any changes between the two sets of plans as being "very, very, very minor revisions". (167) Laverty testified that any modification consisted of only a word or two. (226) Voorneveld testified that not only were any changes minor but that National had in the March 30 plans all the information that it required to do its pricing work, and that he was aware that National would be using the March 30 plans to obtain commitments from its subcontractors. (311-312) Obviously, the differences between the March 30 and April 5 plans, or the lack thereof as contended by the Wiedersum witnesses, was crucial if those subcontractors were to be bound to commitments based on the March 30 plans. Equally obvious is the fact that those differences, if any, were highly relevant to the issue of timeliness without regard to the adequacy or inadequacy of any plans.

On cross examination, Voorneveld was taken through the individual packages of the two sets of plans and asked

to indicate any differences between them. (334-337) He testified that if there were any changes on pages of the April 5 plans, the changed pages would contain a notation in the legend to indicate that a change had been made. (227; 333-334)

Voorneveld's testimony was that the first page containing a change was SK05 where "down spouts" or drain pipes carrying rain water from the roof had been added. (334) He testified that the changes were so minor on SK06 that he could not identify them. (334-335) On SK07 he stated that a minor change had been made in the detail of the insulation for the foundation. (335) The next page on which Voorneveld testified that a change was made was SK016 where the lettering was changed. (335-336) Again on SK017, he testified that the change was in the descriptive notations and could not affect the scope of the work. (336) The only change on SK019 was the addition of the word cement to describe the material to be used for a driveway. (337) He could not find the change on SK020 but testified that it did not involve the substance of the plan. (337)

Gleason's testimony was that the changes between the March 30 and April 5 sets of plans were extensive and involved substantial changes in the labor and material required. Contrary to Voorneveld's testimony, Gleason said there were substantial changes on pages of the April 5 plans which did not contain any indication that changes had been made. Gleason testified that this was a matter of extreme importance because a contractor would rely on the fact that no changes had been made on pages of a later set of plans unless the pages contained a notation that they had been revised. (450-452) The first change Gleason found was on SK02 where two parking lots, a play area and a storm drain requiring 170 feet of pipe were added. In addition, the level of the ground had been lowered requiring additional excavation work. (452-455)

Despite the fact that no changes were indicated as having been made on SK03, Gleason testified that several parking lots and playground areas had been added and the

level of the ground lowered in some areas. (456-457) Again although there was no indication of a revision on SK04, Gleason testified that several parking lots had been added and the level of the ground in some areas changed by as much as one foot. (464-465) On SK05, he testified that the down spouts referred to by Voorneveld were in fact additional structural supports for the roof. (465-466) Further, the floor plan for each of the housing units of the project had additional doors and walls added as well as hand railings. (467-470)

Although Gleason's testimony was that, contrary to plaintiff's testimony, all of the changes that showed up for the first time on the April 5 plans were extensive and costly, the Court refused to allow testimony as to the changes with respect to the remaining 14 pages of the plans and ruled that the testimony as to the changes on pages SK02 through SK06 could be considered only on the question of the credibility of Voorneveld's testimony and therefore had no relevance on the issue of timely delivery of final plans. The colloquy was:

> "MR. MORRISON: Your Honor, I have been very patient through this, but I think that it is obvious that Mr. Simmons intends to go on forever on this.
>
> "I think whatever value this testimony may have in terms of impeachment is far exceeded by the fact that it oversteps the previous ruling [on adequacy] which this Court has made.
>
> "I move to terminate this aspect of the examination.
>
> "THE COURT: I think we have gone along substantially on this matter, so we ought to conclude with it.
>
> "MR. MORRISON: I would also request that the Jury be instructed that the only relevance of this line of questioning is as its affects Mr. Vooreveld's credibility and that the sufficiency of the plans is not at issue in this litigation.
>
> "THE COURT: That is true. I so instruct the Jury. It is not in issue." (473-474)

Thereafter, defendant sought to question Gleason on the differences appearing on each remaining page of the two sets of plans, and plaintiff's objection was sustained as to each page. (474-478; 480-482)

Even under the theory of plaintiff's objection and the Court's ruling that Gleason's testimony as to the changes contained in the first six pages of the plans was relevant only to the issue of Voorneveld's credibility, there was no earthly reason why Gleason should have been precluded from continuing his testimony as to the remaining 14 pages of the plans for the admittedly proper purpose of credibility alone.

Because of the importance of Gleason's testimony on the issue of timeliness, counsel for defendant refused to let the matter drop and pursued it at a side-bar conference so that the Court would be fully aware of the purpose for which the testimony was offered:

> "MR. SIMMONS: Your Honor, the testimony submitted by the plaintiff in this case indicates that final plans were submitted on the 5th of April, one day before the bid date.
>
> "The essence of your [*sic*: our] defense is that plans were not submitted in time.
>
> "Mr. Morrison concedes that the essence [of the defense] is that they weren't submitted in time. That is separate and apart from the question of sufficiency, that there was not enough time to do what had to be done.
>
> "THE COURT: All rig
>
> "I have your point on . What do you say about that?
>
> "MR. MORRISON: He's just rehashing the same thing. We say the final plans were submitted on the 30th.
>
> "MR. SIMMONS: These plans—Mr. Gleason's testimony as to these extensive changes, these changes that Mr. Voorneveld indicated were minor, shows that final

plans were not submitted on the 30th and they were submitted on the 5th, and they were too late.

"That's the whole purpose of this line of questioning.

"MR. MORRISON: Your purpose is to show that what was submitted on the 30th were not sufficient as final plans, and that is not in issue.

"MR. SIMMONS: That is not the issue.

"Mr. Morrison's introduction of Exhibit 16 [April 5 plans] as the final submission shows what the final plans are. If there were extensive changes made, changes made on pages where there was no indication that changes were made, it would have been impossible, and indeed, it was impossible one day before the submission—

"THE COURT: I have your point on that.

"MR. MORRISON: He should have pled that in his answer.

"THE COURT: The ruling I made originally is, it is not an issue that was raised in the pleadings. You do not seem to understand it, and I have mentioned that to you two or three times.

"You may disagree with me but—" (478-480)

The Court was being urged to and did accept plaintiff's fallacious proposition that although timeliness was conceded to be an issue in the case, defendant still should have pleaded as an affirmative defense the fact that the March 30 plans—which were not even referred to in the complaint—were significantly different from the April 5 plans, and presumably should have pleaded the further fact that plaintiff's witnesses would give false testimony as to those differences.

What was obviously happening was that the ruling on plaintiff's initial motion to exclude evidence on adequacy had gotten free of any logical bounds and was running rampant in the courtroom, preventing the introduction of

extremely relevant evidence having nothing to do with adequacy. Rather than being an attempt to ferret out the true facts, the trial became an exercise in keeping facts from the jury or otherwise presenting the facts to them with rulings that made those facts incapable of being understood.

C. National's Performance

It is always relevant in a breach of contract action, where the allegation of the breach has been denied (complaint ¶ 8, at 10, answer ¶ 7, at 15), for the defendant to show what efforts it made to perform in good faith its contractual commitment. While it is not conceded that National ever had an obligation to submit a bid as alleged in the complaint, the fact that National was making every effort to develop a bid is clearly relevant on the issues of timeliness and defendant's performance. Such evidence (*e.g.*, Bolka's testimony and Exhibit K) should not have been excluded. That is still true where the testimony presented also could have been used to establish an unpleaded or stricken affirmative defense.

In *Fluor Corp., Ltd* v. *Illinois Power Co.*, 326 F.2d 374 (7th Cir. 1964), the defendant power company, when sued by its general contractor for amounts owing on a cost-plus contract, counterclaimed for damages for breach of contract. When plaintiff attempted to assert estoppel, waiver, ratification and accord and satisfaction as affirmative defenses to the counterclaim, those defenses were stricken by the Court as being legally insufficient. The defenses were based on the fact that the defendant power company had made payments of other amounts owed to the general contractor at a time when it had knowledge of the facts that were now claimed to give rise to the breach of contract action and raised no objection. The Court held that the evidence was still admissible over the power company's objection that it related to a stricken affirmative defense because it went to the issue of the contractor's performance. Clearly, if the general contractor in *Fluor* could present evidence support-

ing the satisfactory nature of its performance, National was entitled to show here that it was making every good faith effort to put in a bid.

Similarly, Bolka attempted to testify that between April 1 and April 5 he was in South Carolina making every attempt to do as much of the preliminary pricing work as was possible. This effort was made even without having received the March 30 plans, so none of his testimony could have reflected on the adequacy of those plans or the April 5 plans. National argued at trial that its effort was not because of a contractual commitment but because it stood to make a profit only if a successful bid was submitted. However, in the event that a contract was found to exist, the evidence of that effort was highly relevant. The extent of that effort and the problems being encountered are best shown in the notes (Ex. K; 786) made by Bolka while in South Carolina. Those notes were broken down into headings labeled (1) excavation, (2) streets, (3) sidewalks, (4) storm drainage, (5) sanitary sewer, (6) water system, (7) gas distribution and (8) landscaping. Each heading indicated the specific problems that were being encountered by National as it was attempting to do what the complaint alleged it was contractually bound to do.

The notes were excluded on two grounds, neither of which is supportable. First it was contended that all except item 1, dealing with excavations, was excludable on the ground that the matters discussed did not relate to problems with the soil conditions which National referred to in its interrogatory answer. (586-587) The fact is that Bolka was sent to South Carolina for the express purpose of obtaining bids from subcontractors for the required labor and materials for land improvement work. (578-579) The interrogatory answer specifically refers to the inability to obtain such bids as a reason for the decision not to submit a proposal. Each of the other items referred to in his notes deal precisely with the problems that he was experiencing in obtaining such bids. For convenience sake his notes separated the problems into categories relating to streets, side-

walks, etc., but the overriding problem was the inability to obtain commitments from subcontractors concerning those items.

The other ground asserted for excluding the memo was that the notes reflected on the insufficiency of Wiedersum's plans. But it was clear that Bolka did not have the March 30 plans with him (indeed, plaintiff so argued on summation (724-725)), and the April 5 plans had not even been sent to National at that time. However, the Court bought the argument (589) that the notes might confuse the jury and lead them to think that Bolka was casting aspersions on plans that he testified he did not even know existed at the time.

Separate and apart from whether there was any substance to the grounds given for excluding Bolka's notes, the evidence went to show what attempts National was making to put together a bid and was relevant on the questions of timeliness and National's good faith performance. As such, it should have been admitted and Rule 8(c) could not be a bar.

D. Wiedersum's Affirmative Case

As part of its affirmative case, Wiedersum introduced into evidence the March 30 (Ex. 11) and April 5 (Ex. 16) plans and its witnesses testified as to the minor nature of the differences between them and that the plans were sufficient to enable National to prepare a bid. Such evidence having been admitted, it was proper for National to then produce evidence concerning the plaintiff's exhibits and testimony contradicting Wiedersum's testimony. Defendant made this point clear to the Court in opposition to one of plaintiff's objections to exclude evidence on the differences between the March 30 and April 5 plans:

> "Mr. Simmons: May I be heard?
>
> "Mr. Voornefeld [sic: Voorneveld] testified on direct examination yesterday, I believe, that the plans, Exhibit 16, were substantially similar to Exhibit 11. That was his testimony, that any revisions made were minor.

> "We didn't introduce this evidence, Mr. Morrison did. And having opened the door, your Honor, I submit that this testimony now is quite proper.
>
> "It bears directly on evidence submitted in connection with plaintiff's case in chief." (460)

A defendant has such a right to make use of evidence introduced by the plaintiff, even where the evidence could go to establish an unpleaded affirmative defense. *Bradford Audio Corp.* v. *Pious,* 392 F.2d 67 (2d Cir. 1968); *Iacaponi* v. *New Amsterdam Casualty Co.,* 379 F.2d 311 (3rd Cir. 1967); *Federal Savings and Loan Insurance Corp.* v. *Hogan,* 476 F.2d 1182 (7th Cir. 1973).

In *Bradford Audio Corp.* v. *Pious,* an objection was made because the defendant did not affirmatively plead that his seizure of property was pursuant to orders of a state court. Such a defense was said to be based on an official immunity and was required to be affirmatively pleaded pursuant to Rule 8(c). The Court held that the defense was proper and said:

> "But the appellant itself put into evidence all of the state court record of the proceedings, including the appointing orders and the specific direction to the receiver to seize the $50,000 in the Roth Special Deposit. The appellee may avail himself of the appellant's proof. 2A Moore, Federal Practice ¶ 8.27 [3] at 1853 (2d ed. 1967)." (392 F.2d at 73)

Wiedersum's complaint (8-13) alleged that the parties had agreed to be governed by the terms of a previous contract between them. The terms of that contract required that Wiedersum's plans be in accordance with the specifications of the authority soliciting the bids. The face of the complaint raises the requirement that the plans satisfy certain conditions and provide National with certain information. Any evidence concerning the sufficiency of the plans in that respect was clearly proper and should not have been excluded. *Iacaponi* v. *New Amsterdam Casualty Co., supra.*

When, to establish its case, Wiedersum introduced the March 30 and April 5 plans (each of which consisted of 20 pages of blueprints) and offered testimony that there was little difference between the two, National was not required to rely on the ability of a jury of laymen to inspect those plans and determine whether there were any significant differences between them. Defendant was entitled to introduce evidence of the differences and that they were material.

II

The Adequacy of Wiedersum's Plans was not an Affirmative Defense but an Element of Wiedersum's Affirmative Case.

The basis of Wiedersum's motion to exclude evidence on adequacy was that National, in contending that the plans submitted to it did not meet the specifications of the Navy, was asserting that there had been a failure of consideration which Rule 8(c) requires to be pleaded as an affirmative defense. The ruling of the Court missed entirely the thrust of National's evidence. National was not seeking to establish that there was no contract because it had not received what it had bargained for. Rather, the evidence described in National's trial memorandum—that Wiedersum's plans did not conform to the Navy's specifications for the South Carolina Project—sought to negate a basic element of Wiedersum's cause of action.

The complaint alleged that the parties had agreed to be governed by the terms of their previous contract, for the New Jersey Project. The contract for the New Jersey Project (Ex. 1, at 77-83) specifically required that Wiedersum's plans be in accordance with the specifications of the awarding authority. The question then of whether Wiedersum's plans met the criteria set by the Navy for the South Carolina Project went directly to whether Wiedersum performed under the contract that it alleged existed so that any bid submitted based on Wiedersum's plans stood any chance of success. Obviously, if the failure of the plans to meet the

criteria of the Navy would have resulted in the bid being rejected, Wiedersum has no claim that it was hurt by National's failure to submit a bid. Such evidence has nothing whatever to do with failure of consideration.

National made no contention that there was no contract between it and Wiedersum because National did not receive any consideration. While it does contend that a contract did not exist, that contention is based on the fact that it never agreed to such a contract. What National's evidence on adequacy sought to attack were the basic elements of Wiedersum's case that it had performed and was damaged by National's failure to submit a bid.

It is basic that evidence which goes merely to negate plaintiff's case is not an affirmative defense, even where the provisions of Rule 8(c) appear to apply. *Sanden* v. *Mayo Clinic,* 495 F.2d 221 (8th Cir. 1974); *Travelers Indemnity Co.* v. *Peacock Construction Co.*, 423 F.2d 1153 (5th Cir. 1970); 2A *Moore's Fed. Practice,* ¶ 8.27(3) (2d ed. 1975) at 1851 ("a truly affirmative defense raises matters outside the concept of plaintiff's prima facie case"). In *Sanden* v. *May Clinic,* the defendant was allowed to introduce evidence in a malpractice action that the plaintiff had conspired with her attorney to commence the lawsuit prior to being treated. The objection made was that such evidence went to the affirmative defense of fraud. The Court held that the introduction of the evidence was proper because it undercut some of the necessary elements of plaintiff's claim that she was damaged by defendant.

> "Rule 8(c) requires that fraud and other matters in avoidance of the plaintiff's case be specifically pleaded in the defendants' answer when invoked as affirmative defenses. However, 'if the defense involved is one that merely negates an element of the plaintiff's prima facie case * * * it is not truly an affirmative defense and need not be pleaded despite rule 8(c).' 2A J. Moore, Moore's Federal Practice ¶ 8.27[2], at 1843 (2d ed. 1974)."(495 F.2d at 224).

In the *Travelers Indemnity Co.* case, *supra,* it was claimed that it was error for the Court to have made a finding of estoppel when estoppel had not been pleaded as an affirmative defense. The Court rejected the contention, saying:

> "But we do not read these words with such rigidity. It is clear that the Trial Judge's finding of estoppel was just another way of saying that he, as the trier of fact, believed that the amount originally claimed by letter to Travelers rather than the greater amount claimed at trial was the true extent of Peacock's back charges." (423 F.2d at 1157)

Evidence showing that Wiedersum's plans did not conform to the Navy's specifications would have done nothing more than negate the elements of performance and damage of Wiedersum's *prima facie* case. The fact that the plans provided for a net area that exceeded the net area allowed under the Navy specifications and that street sizes and other details were not shown as required by the specifications (as argued in defendant's trial memorandum, at 120-121) would have resulted in a bid based on those plans being rejected. It was not National that had to be satisfied, but the Navy. Unless the Navy specifications were shown to have been met, Wiedersum had not proved its case of a breach of contract causing it damage.

III

It was Prejudicial Error for the Court to Prevent the Complaint from Going to the Jury.

The Court erred in refusing National's offer of the complaint into evidence at the conclusion of National's case, or in not otherwise making the pleadings available to the jury as requested by National. Although a request was made by National that the pleadings be received in evidence, the Court refused the request and said the pleadings were always before the Court. (667) Counsel responded by saying that he only wanted to make sure that the pleadings would be before the jury during its deliberation. (*id.*) Dur-

ing summation, National's counsel argued to the jury that there was a serious dispute as to when final plans were actually submitted. He then told the jury that "You will have the pleadings in front of you—" (707) There followed an objection by plaintiff's counsel that the jury could not take the pleadings into the jury room, and the Court concurred. (*id.*) The pleadings, in fact, were not allowed to be put before the jury during their deliberations.

It has too long been the law to now be the subject of serious dispute that matters stated in pleadings are admissions of the party and are clearly relevant evidence. *Kunglig Jarnvagsstyrelsen* v. *Dexter & Carpenter, Inc.*, 32 F.2d 195 (2d Cir.), *cert. denied*, 280 U.S. 579 (1929); IX *Wigmore on Evidence*, § 2588 at 586 (3d ed. 1940); 31A *C.J.S., Evidence*, § 301 at 772-3.

In *Kunglig Jarnvagsstyrelsen* v. *Dexter & Carpenter, supra*, the trial court admitted into evidence a complaint over objection that plaintiff's attorney had no authority to bind his client by the averments in the pleading. This Court found the objection "clearly not sustainable" and held at 198: "A pleading prepared by an attorney is an admission by one presumptively authorized to speak for his principal. See Putnam v. Day, 22 Wall. 60, 22 L.Ed. 764; Shaft v. Phoenix Mut. Life Ins. Co., 67 N.Y. 544, 23 Am. Rep. 138; N.E. Road Machinery Co. v. Vanderhoof, 19 F. (2d) 331 (C.C.A.1.); Christy v. Atchison, T.&S.F. Ry. Co., 233 F. 255 (C.C.A. 8)." By preventing the jury from seeing the admissions contained in the complaint, the court below improperly curtailed the presentation of National's defense and committed reversible error.

Other courts which have considered the question are in accord with the position of this Court that admissions contained in pleadings are admissible in evidence and have conclusive effect. As the court observed in *Ben-Tom Supply Co., Inc.* v. *V.N. Green & Co., Inc.*, 338 F. Supp. 59, 64 (S.D. W.Va. 1971): "It is of course settled beyond dispute that statements in a party's pleading may constitute an admission as to that party." The court went on to find the admis-

sions contained in defendants' answer to be competent evidence and conclusive as against a third-party defendant who had no personal part in the particular transaction at issue. Also on point is *Hall* v. *United States,* 314 F.Supp. 1135, 1137-1138 n.3 (N.D. Cal. 1970), where the court noted:

> "It is a basic rule that statements made in a Complaint may be admitted against the pleader as evidence in the form of judicial admissions. Sanitary Milk Producers v. Bergjans Farm Dairy, Inc. 368 F.2d 679, 687 (8th Cir. 1966); Giannone v. United States Steel Corporation, 238 F.2d 544, 547 (3d Cir. 1956); Stolte v. Larkin, 110 F.2d 226, 232-233 (8th Cir. 1940); Yaskin v. Allston, 179 F.Supp. 757, 758 (E.D. Pa. 1959), aff'd per curiam, 277 F.2d 926 (3d Cir. 1960); IX Wigmore on Evidence § 2588 at 586 (3d ed. 1940); McCormick on Evidence § 239, § 242 at 508-509 (1954 ed.); 31A C.J.S. Evidence § 301 at pp. 772-773; 29 Am.Jur.2d Evidence § 615 at 668, § 687 at 741. The usual rule is that such admissions are conclusive, C.H. Elle Construction Co. v. Western Casualty & Sur. Co., 294 F.2d 459, 462 (9th Cir. 1961); IX Wigmore § 2590 at 587; McCormick § 242 at 472; Witkin, California Evidence § 501 at 472 (2d ed. 1966), although such admissions will not defeat a cause of action where they are of probative rather than of ultimate facts. Peters v. Lines, 275 F.2d 919, 928 (9th Cir. 1960); *cf.* State Farm Mut. Auto Ins. Co. v. Porter, 186 F.2d 834, 843 (9th Cir. 1950)."

It should also be noted that while an operative pleading constitutes a judicial admission of the facts alleged therein and is conclusive upon the party author, even a superceded pleading may be introduced into evidence for whatever probative effect it might have. As this Court stated in *Kunglig Jarnvagsstyrelsen* v. *Dexter & Carpenter, supra,* at 198: "When a pleading is amended or withdrawn, the superceded portion ceases to be a conclusive judicial admission; but it still remains as a statement once seriously made by an authorized agent, and as such it is competent evidence of the facts stated, though controvertible, like any

other extra judicial admission made by a party or his agent." Accord, *Giannone* v. *United States Steel Corp.*, 238 F.2d 544 (3d Cir. 1956); *Pullman Co.* v. *Bullard*, 44 F.2d 347 (5th Cir. 1930); *Tiana Corp.* v. *Hartley*, 99 F.Supp. 670 (S.D.N.Y. 1951). The complaint which National sought to introduce into evidence in this action was, of course, an operative pleading. Even had it been withdrawn, however, it still would have been admissible, and error to exclude it.

The evidence presented was far from clear as to exactly what set of plans were the final plans, a matter of extreme importance in the case. National was entitled to have before the jury Wiedersum's allegation that final plans were sent to National on April 4 (complaint ¶ 7; 10), not March 30 as plaintiff's counsel sometimes argued. (478-480) The jury was entitled to see how Wiedersum described its claim and National was entitled to argue whatever inferences might be drawn from what was obviously one of the most important documents in the litigation. The refusal of the Court to admit the complaint as evidence or to allow it otherwise to be put before the jury was clear error and was prejudicial to National on at least the issues of what plans were the final plans and timeliness.

IV

The Court's Failure to Inform Counsel of its Charge Before Summation was Plain Error and Prejudicial.

Prior to trial, both parties had submitted detailed and conflicting written requests for jury instructions. (140-165) In addition, as seen above, the course of the trial had shown that the Court's charge would be pivotal on a number of issues. Immediately prior to summation, counsel for National requested that the Court inform both sides of its intended charge and specifically called the requirements of Rule 51 to the Court's attention. The Court nevertheless refused the request: (688)

> "MR. SIMMONS: May we have your charge at this time.

"MR. BROOKS: Under Rule 51 it provides that counsel is provided your charge before the summation begins.

"THE COURT: I've never done that. It works out very well. Wait till the end. You can make your exceptions. That's what I will adhere to. So you may proceed, gentlemen.

"Bring in the jury."

The refusal of the Court to honor the request for its intended charge was in clear violation of Rule 51, which is mandatory. The rule provides:

> "At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court *shall* inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed." (emphasis added)

It is not left to the discretion of the Court to determine whether it will comply with the rule. *Bradshaw* v. *Thompson,* 454 F.2d 75, 81 (6th Cir. 1972), *cert. denied,* 409 U.S. 878 (1972) ("unconditional mandate"); *Hardigg* v. *Inglett,* 250 F.2d 895, 897 (4th Cir. 1957) ("the requirement of Rule 51 . . . is mandatory").

The requirement that counsel be informed of the charge prior to summing up is not an arbitrary direction. Indeed, as the Court said in *Dallas Ry. & Terminal Co.* v. *Sullivan,* 108 F.2d 581, 583 (5th Cir. 1940), Rule 51 "is designed to afford counsel an opportunity to know in advance of the argument, the guiding principles under which the argument should be made". See also, *Hetzel* v. *Jewel Companies, Inc.,* 457 F.2d 527 (7th Cir. 1972); *Downie* v. *Powers* 193 F.2d 760 (10th Cir. 1951); *Tyrill* v. *Alcoa Steamship Co., Inc.,* 185 F.Supp. 822 (S.D.N.Y. 1960).

In view of the issues in the instant case, the refusal of the Court to indicate its charge was particularly prejudicial. For example, Wiedersum had indicated that it asserted promissory estoppel as a theory of recovery. National's position was that such a cause of action was not available in a situation where the basic claim was clearly grounded in contract. In submitting its request for jury instructions, National had made a request on that issue but had indicated it was only being submitted in the event that the Court determined to submit such a cause of action to the jury. (164) Obviously, without knowing the Court's proposed charge, counsel for National was in the untenable position of having either to argue facts relating to promissory estoppel, which issue it contended should not even go to the jury, or foregoing addressing the point. National, believing its interpretation of the law to be correct, did not argue against recovery on a theory of promissory estoppel. Nevertheless, the Court did charge that plaintiff could recover on such a theory (749), to which National excepted. (758)

Similarly, National had filed a written request that the Court charge that for plaintiff to recover, the jury must find that the plans submitted met the requirements of the Navy. (164) The question of the adequacy of Wiedersum's plans had been a hotly contested issue throughout the trial. Matters had become complicated by various rulings of the Court excluding evidence on other relevant issues so that by the conclusion of the trial it was no mean task to predict exactly what issues would be put to the jury under what instructions. Absent knowledge of what the charge would be, defendant, guided by the Court's prior rulings, did not argue to the jury that Wiedersum's plans did not meet the requirements of the Navy. (689-713) Surprisingly enough, the Court did charge the jury that Wiedersum's plans had to meet the requirements of the Navy (754), albeit in the face of a conflicting charge that the adequacy of plaintiff's plans was not an issue in the case. (749-750)

Given the rulings from the Court, the problem of formulating a summation absent the protection of Rule 51 was extremely difficult, and resulted in severe prejudice to defendant. Such a situation is exactly what Rule 51 is designed to prevent.

V

On the facts of this Case, it was Error to Charge the Jury that Plaintiff Could Recover on a Theory of Promissory Estoppel.

One of the theories on which the Court submitted the case to the jury was based on promissory estoppel. That portion of the charge read as follows:

> "If you find that the conduct of the defendant reasonably led plaintiff to believe that defendant would submit a bid on the South Carolina project, and that plaintiff relies [sic] on this conduct by doing all the work necessary to prepare final site and architectural plans for this project, such a finding would satisfy the requirement of plaintiff to prove the existence of an agreement." (749)

It is the portion of the charge relating to plaintiff being misled by defendant's conduct that identifies the charge as one based on promissory estoppel. *Restatement of Contracts* (2d), § 90; *Ted Spangenberg Co.* v. *Peoples Natural Gas*, 305 F.Supp. 1129 (S.D. Iowa 1969), *aff'd*, 439 F.2d 1260 (8th Cir. 1971).

A more articulate and a correct statement of the elements of estoppel are found in *Ted Spangenberg Co.* v. *Peoples Natural Gas*, *supra*, where the Court said:

> "The elements most commonly associated with this theory are: (1) a clear and definite oral promise, (2) reasonable reliance by plaintiff on said promise, and (3) the weight of the equities clearly preponderates in favor of the plaintiff. See Miller v. Lawlor, *supra;* [245 Iowa 1144, 66 N.W. 2d 267 (1954)]; Shell Oil Co.

v. Kelinson, *supra* [158 N.W. 2d 724 (1968)]." (305 F. Supp. at 1133)

The error in submitting a charge based on even a correct statement of the elements of promissory estoppel is that there is no such cause of action in a case in which the essence of the claim is one for breach of contract. In *Bethlehem Fabricators, Inc.* v. *British Overseas Airways Corp.*, 434 F.2d 840 (2d Cir. 1970), this Court said the following in an action in which a claim for promissory estoppel was asserted:

> "Although the defendant claims that gratuitous promises inducing detrimental reliance have not been enforced in New York except in charitable subscription cases, this is not strictly true in the light of the New York cases imposing liability on those who promise that there will be insurance and fail to fulfill that promise, Siegel v. Spear & Co., 234 N.Y. 479, 138 N.E. 414 (1923); cf. International Products Co. v. Erie R. Co. 244 N.Y. 331, 155 N.E. 662 (1927); Bush Terminal Co. v. Globe & Rutgers Fire Ins. Co., 182 App. Div. 748, 169 N.Y.S. 734 (1st Dep't. 1918), aff'd 228 N.Y. 575, 127 N.E. 909 (1920), or who let insurance lapse, Spiegel v. Metropolitan Life Ins. Co., 6 N.Y. 2d 91, 188 N.Y.S. 2d 486, 160 N.E. 2d 40 (1959). Since the consequences for Bethlehem of its reliance on BOAC's promise to require a payment bond were potentially as severe as were the consequences in the insurance cases, there is no persuasive reason for distinguishing those cases." (434 F.2d at 844)

The reason for restricting the doctrine of promissory estoppel to charitable subscriptions and insurance cases is readily apparent. There is no requirement that there be consideration given in return for the promise. See, Restatement of Contracts (2d), § 90; *James Baird Co.* v. *Gimbel Bros., Inc.*, 64 F.2d 344 (2d Cir. 1933). If not kept within bounds, the doctrine would render meaningless the other elements of a breach of contract claim. It is applied

according to Section 90 of the Restatement when "injustice can be avoided only by enforcement of the promise."

In the usual insurance case involving promissory estoppel, a promise is made that insurance will be obtained. When the promise is breached and merchandise is destroyed, the injustice of allowing the promisor to escape without any responsibility is clear.

In *Bethlehem Fabricators, supra,* plaintiff was a subcontractor for a facility being constructed for BOAC and had been informed by BOAC that a bond would be required from the general contractor to insure payment to the subcontractors. Plaintiff, having once failed to receive payment from the same general contractor involved, sought and obtained assurances from BOAC as to the payment bond. Thereafter, for reasons having to do with cutting its own costs, BOAC decided that it would not require the bond. The general contractor once again defaulted and plaintiff found itself twice burned and sued BOAC.

The case is quite analogous to the insurance cases to which the doctrine has generally been restricted. Promissory estoppel is not and should not be applied to the garden variety commercial or construction case such as the present action, where a plaintiff seeks to use it as a fall-back in the event that it cannot establish its contractual claim.

VI

The Court's Charge to the Jury was so Conflicting and Irreconcilable as to Deny a Fair Trial on the Applicable Principles of Law.

The evidence in this case was presented to the jury with instructions that were contradictory and could not have provided the jury with the required guidance as to the applicable principles of law. Undoubtedly, the reason for the contradictory nature of the charge was the fact that the Court read its charge from the separate requests for instructions submitted by National and Wiedersum, without attempting to reconcile contradictory charges.

On the issue of the adequacy of the final plans, the following portion of the charge was taken from the request submitted by Wiedersum:

> "Defendant contends* that its failure to submit a bid on the South Carolina project is justified by plaintiff's failure to submit final plans on time, by problems with the soil conditions at the project and by its inability to get bids from its subcontractors for necessary land improvement work; also that those are the only matters in issue in this case regarding the existence of an excuse for the defendant's failure to submit a bid and that you should not consider any other matters in this regard.
>
> The plaintiff further contends that the defendant attempted to introduce evidence regarding certain alleged inadequacies in the drawings prepared by plaintiff and that this evidence was excluded because the question of the adequacy of plaintiff's drawings is not an issue in this case." (749-750)

On that same issue the Court read the following portion of its charge from the request for instructions submitted by National:

> "In the event that you find the plans were submitted to defendant in [a] timely manner, you must next consider whether the plans submitted met the requirements of the Navy. If you fail to find either that the plans were timely submitted or that they did not meet the requirements of the Navy, you must return a verdict in favor of defendant." (754)

On the issue of the existence of an agreement, the Court read the following portion of its charge from the request for instructions from Wiedersum:

> "If you find that the conduct of the defendant reasonably led plaintiff to believe that defendant would

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* The Court later explained to the jury that all statements made by the Court in the course of its charge on the part of the plaintiff and defendant were instructions of the Court. (759)

submit a bid on the South Carolina project, and that plaintiff relies [*sic*] on this conduct by doing all the necessary work to prepare final site and architectural plans for this project, such a finding would satisfy the requirement of plaintiff to prove the evidence of an agreement." (749)

On the same issue, the Court read the following portion of its charge from National's request for instructions:

> "You must determine on the basis of the evidence presented whether plaintiff has established that defendant's words or actions evident [sic] an agreement or promise to submit a proposal. In this connection, defendant's hope or expectation that a proposal would or could be submitted is not in or of itself sufficient. It must be established that there was an agreement or promise by defendant or you must return a verdict in his [sic] favor." (753)

On the issue of damages, the Court read the following portion of its charge from the request for instructions of Wiedersum:

> "Accordingly, if you find in plaintiff's favor on these issues [the existence of an agreement], I instruct you that plaintiff is entitled to recover the reasonable value of its services in preparing the site and architectural plans for the South Carolina project. If you reach the question of damages, you must decide on the basis of all the evidence, the reasonable value of plaintiff's services in preparing the site and architectural plans of the South Carolina project." (751)

On that same issue the Court read the following portion of its charge from National's request for instructions:

> "The amount of damages cannot be left to speculation or conjecture. Plaintiff contends that as a result of wrongs by defendant it incurred various costs and expenses. You must be satisfied to a reasonable degree

of certainty that plaintiff did in fact incur such costs and expenses and the amount incurred before such an amount can be awarded as damages.

"Defendant contends that any costs and expenses that plaintiff incurred were in connection with the preparation of a proposal and that it was at all times understood that each party was to bear its own expenses and would have no right to reimbursement from the other. If you find that it was understood that any costs that might be incurred by either party would be borne by that party and the only right to receive any amounts in connection with a proposal would be in the event that the proposal was successful and the contract awarded then you should reach a verdict in favor of defendant." (755)

After hearing the Court's charge, National made two exceptions:

"MR. SIMMONS: We except to your Honor's charge that the inadequacy and sufficiency of the plans is not at issue. We also except to the charge that if the plaintiff was misled by the conduct of the defendant that would constitute an agreement.

"THE COURT: I understand.

"MR. SIMMONS: You read this language. You read specific language from [plaintiff's] request number three. As a matter of law for the reasons we set forth in our trial memorandum that cause of action for promissory estoppel does not lie in this sort of a situation.

"THE COURT: I have your point." (758-759)

In assessing a party's objection to the court's charge, "the evidence and inferences therefrom must be viewed in the light most favorable to" that party. *Curko* v. *William Spencer & Son, Corp.*, 294 F.2d 410, 412 (2d Cir. 1961). While National took no exception to the irreconcilable and confusing nature of the charge, under the circumstances

such a task was impossible and would have resulted in counsel's usurping the function to be performed by the Court. Where the charge as a whole is irreconcilable and overwhelmingly confusing, no exception need be made for an appellate court to set the trial aside on the ground that the trial could not have been a fair trial held under the applicable principles of law.

The nature of the Court's charge was so internally inconsistent that it was, in effect, no charge at all. For a jury to have made any sense out of the applicable legal principles after listening to the Court read such conflicting instructions is unlikely to say the least. In *Johnson* v. *Blaney*, 198 N.Y. 312 (1910), the Court, in passing on precisely such instructions, said the following:

> "While slight inconsistencies may be disregarded when the substance is right, and when it is apparent from reading the charge as a whole that the jury could not have been misled, the judgment should not be reversed, when, as in this case, no one can tell what the court really meant, and the propositions are as irreconcilable as yes and no, there should be a new trial so that the issues may be decided by a jury without danger of confusion in their minds as to the law.
>
> "The judgment should be reversed and a new trial granted . . ." (198 N.Y. at 317)

Both parties were entitled to a clear and "unambiguous instruction of the pertinent law." *Schafer* v. *Norwood Equipment Corp.*, 277 App. Div. 933, 934 (2d Dep't. 1950) (memo). *See also, Herbst* v. *Balogh*, 7 App. Div. 2d 530 (1st Dep't. 1959); *U.S. Vitamin & Pharmaceutical Corp.* v. *Capital Cold Storage Co., Inc.*, 21 App. Div. 2d 661 (1st Dep't. 1964) (memo): "Where a charge is so inadequate as to preclude fair consideration by the jury of the issues, the judgment entered on the resulting verdict will be reversed and a new trial ordered."

A charge of the type given by the Court below was such that it requires reversal even in the absence of an objection

by either party. *See Ferrara* v. *Sheraton McAlpin Corp.*, 311 F.2d 294 (2d Cir 1962); *Johnson* v. *Erie Railroad Co.*, 236 F.2d 352 (2d Cir. 1956). Undoubtedly, the Court's difficulty in presenting its charge could have been alleviated to some extent if it had followed the dictates of Rule 51 and given its proposed charge to counsel prior to summation. One of the purposes of that Rule is to provide counsel with sufficient time in order to articulate their objections to the proposed charge so that they might aid the Court in avoiding "plain error". *See, Tyrill* v. *Alcoa Steamship Co., Inc.*, 185 F.Supp. 822, 824 (S.D.N.Y. 1960)

VII

There was no Factual Basis for the Amount of the Jury Award.

It was undisputed that Wiedersum at all times understood that it would receive nothing in connection with the South Carolina Project unless a contract were awarded on the bid submitted by National. There was neither an allegation made nor evidence submitted that National ever agreed to pay Wiedersum any fee measured by the amount of Wiedersum's usual or reasonable fee for its services or by any other method absent a winning bid. Indeed, the admissions of Wiedersum's own witnesses established the contrary—that each party would bear its own costs and expenses and would not receive any reimbursement from the other. Such had been the practice and understanding on all other projects on which the parties had worked together. The only evidence of Wiedersum's expenses on the South Carolina Project showed costs of $6,556.02. On the evidence submitted, there was no basis for an award in Wiedersum's favor of $150,000. Therefore, at the close of trial National moved for a reduction in the amount of the verdict. The motion was denied. (762)

In order for damages to be awarded in a breach of contract action, such damages must be shown by the evidence and cannot be left to speculation. *25 Fifth Ave.*

Management Co., Inc. v. *Ivor B. Clark, Inc.*, 280 App.Div. 205 (1st Dept.), *aff'd*, 304 N.Y. 808 (1952); *James Wood General Trading Establishment* v. *Coe*, 297 F.2d 651 (2d Cir. 1961); *Broadway Photoplay Co.* v. *World Film Corp.*, 225 N.Y. 104 (1919); *Waterman* v. *State*, 35 Misc.2d 954 (Ct. Cl. 1962); *Dunkel* v. *McDonald*, 272 App. Div. 267 (1st Dep't. 1947).

In *25 Fifth Ave. Management Co., supra,* the Court in discussing the required certainty said:

> "Plaintiff's proof on the subject of damages was required to establish a loss that flowed naturally and directly from defendant's breach of its engagement. The proof in this regard lacked that standard of reasonable certainty required to establish damages (*Wakeman* v. *Wheeler & Wilson Mfg. Co.*, 101 N.Y. 205; Witherbee v. Meyer, 155 N.Y. 446). The fact of damage must be susceptible of ascertainment in some manner other than mere conjecture or guesswork (*Broadway Photoplay Co.* v. *World Film Corp.*, 225 N.Y. 104, 109; *Dunkel* v. *McDonald*, 272 App. Div. 267; *Bannatyne* v. *Florence Milling & Mining Co.*, 77 Hun 289; 1 Sedgwick on Damages [9th ed.], §§ 170-172)." (280 App. Div. at 208)

There plaintiff had alleged that it had hired defendant to secure a discount on a mortgage on plaintiff's property, which mortgage was held by a third party. On defendant's failure to live up to the agreement, plaintiff sued and obtained a jury verdict of $37,000, presumably the amount of the discount that was not obtained. However, the record disclosed no basis for pegging any damage to plaintiff at that amount and the Appellate Division reversed.

Just as in *25 Fifth Ave. Management Co.*, there was no showing here that the various things needed to be done to accomplish the objective sought (obtaining from the Navy award of the contract for the South Carolina Project) could ever have been done. Such a state of uncertainty cannot support an award of damages. Likewise, there was no showing here that National agreed to pay Wiedersum anything

for its services in drafting plans. National, too, was expending time and money in connection with the project. It had informed Wiedersum in no uncertain terms that it would not even pay Wiedersum's out of pocket expenses. For the jury to return a verdict in Wiedersum's favor for an amount that was in excess of those expenses is to make an agreement for Wiedersum that it admits it could not make and is therefore pure speculation.

Even if a bid had been submitted, it is most likely that it would have been unsuccessful. Wiedersum and National had worked together on projects in the past and had never once been awarded a contract on their bid. Had a bid been submitted, and been unsuccessful, Wiedersum would have no cause to complain. Obviously, the jury award of $150,000 in its favor gives Wiedersum $150,000 more than it would have received had National not committed the alleged breach of contract, but had simply performed as in the past. No matter how it is viewed, an award of $150,000 is pure speculation.

Conclusion

The judgment below should be reversed. A new trial should be ordered. In the alternative, the amount of the judgment should be reduced to $6,556.02.

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Respectfully submitted,

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